



BRB No. 17-0149 BLA
Case No. 2012-BLA-06087

MARGIE NAPIER)	
(Widow of ELHANNON NAPIER))	
)	
Claimant-Respondent)	
)	
v.)	
)	
STAR FIRE COALS, INCORPORATED)	
)	DATE ISSUED: 07/05/2018
and)	
)	
OLD REPUBLIC INSURANCE COMPANY)	
)	
Employer/Carrier-)	
Petitioners)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	ORDER on
)	RECONSIDERATION and
Party-in-Interest)	AWARD of FEES

As no member of the panel has voted to vacate or modify the decision herein, the motion for reconsideration filed by employer is DENIED.¹ 33 U.S.C. §921(b)(5); 20 C.F.R. §§801.301(b); 802.407(a); 802.409.

¹ Employer argues for the first time on reconsideration that the manner in which Department of Labor administrative law judges are appointed may violate the Appointments Clause of the Constitution, Art. II § 2, cl. 2. Employer's Motion for Reconsideration at 1-7. The Director, Office of Workers' Compensation Programs (the Director), responds that employer waived this argument by failing to raise it in its opening brief. Director's Response at 2. We agree with the Director. Because employer first raised

Claimant's counsel has filed a complete, itemized statement requesting a fee for services performed before the Board pursuant to 20 C.F.R. §802.203. Counsel requests a fee of \$4,793.75 for 9.75 hours of legal services at an hourly rate of \$425.00 (Joseph E. Wolfe) and 3.25 hours of legal services at an hourly rate of \$200.00 (Brad A. Austin). Employer objects to the hourly rates as not market based and excessive, and requests that the fees of Mr. Wolfe and Mr. Austin be reduced.

In support of his fee petition, counsel has provided a list of seventy black lung cases in which the Office of Administrative Law Judges, the Board, and the United States Court of Appeals for the Fourth Circuit awarded attorney fees to his firm.² Fifty-four of the cases include fees awarded for Mr. Wolfe's work. The list includes one case from August 2008 in which the Board affirmed an award from the Office of Administrative Law Judges where Mr. Wolfe received an hourly rate of \$400.00. In six cases, an administrative law judge awarded counsel an hourly rate of \$425.00, but noted that no objections were filed.³ In two other cases, Mr. Wolfe was awarded an hourly rate of \$425.00 by the United States Court of Appeals for the Fourth Circuit. *Donaldson Mining Co. v. Hinzman*, No. 16-1185

the Appointments Clause issue fourteen months after it filed its appeal, one year after it filed its opening brief, and only after the Board issued its decision on the merits, employer waived the issue. *See Lucia v. SEC*, 585 U.S. , 2018 WL 3057893 at *8 (June 21, 2018) (requiring “a timely challenge to the constitutional validity of the appointment of an officer who adjudicates [a party’s] case”); *see also Williams v. Humphreys Enters., Inc.*, 19 BLR 1-111, 1-114 (1995) (the Board generally will not consider new issues raised by the petitioner after it has filed its brief identifying the issues to be considered on appeal); *Senick v. Keystone Coal Mining Co.*, 5 BLR 1-395, 1-398 (1982).

² Counsel further argues that his requested rates are reasonable in light of the experience and qualifications of the representatives, their passion for their work, and the lack of attorneys taking similar cases.

³ In a Supplemental Order Awarding Fees in *Hall v. Cody Mining Co.*, 2013-BLA-05449 (Jan. 26, 2016) (Order), the administrative law judge questioned Mr. Wolfe's requested hourly rate, and stated that he would carefully consider any objections to the hourly rate in any future fee petition from his firm. In the Orders Awarding Fees in *Young v. James River Coal Co.*, 2014-BLA-05168 (July 25, 2015) (Order), *Wright v. Shipyard River Coal Terminal Co.*, 2016-BLA-05166 (Nov. 7, 2016) (Order), *Muncy v. Dir., OWCP*, 2013-BLA-06086 (Jan. 17, 2017) (Order), *Lee v. Cody Mining Co., Inc.*, 2012-BLA-05365 (Jan. 20, 2017) (Order), and *Fortney v. Dir., OWCP*, 2014-BLA-00014 (Jan. 24, 2017) (Order), the administrative law judge noted that no objection was filed.

(4th Cir. Apr. 13, 2016) (Order);⁴ *S. Ohio Coal Co. v. Weaver*, No. 16-1580 (4th Cir. July 11, 2016) (Order). Of the remaining cases submitted, Mr. Wolfe has been awarded an hourly rate of \$350.00 on nineteen occasions, \$325.00 on three occasions, and \$300.00 on twenty-three occasions.

Evidence of fees received in the past provides some guidance as to what the market rate is, and is appropriately included within the range of sources from which to ascertain a reasonable rate. *See B & G Mining, Inc. v. Director, OWCP [Bentley]*, 522 F.3d 657, 664, 24 BLR 2-106, 2-122-23 (6th Cir. 2008); *see also E. Associated Coal Corp. v. Director, OWCP [Gosnell]*, 724 F.3d 561, 572, 25 BLR 2-359, 2-375-76 (4th Cir. 2013); *Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 290, 24 BLR 2-269, 2-291 (4th Cir. 2010). As counsel has not presented sufficient evidence to support his request for an hourly rate of \$425.00,⁵ the Board finds an hourly rate of \$300.00 for Mr. Wolfe to be reasonable based on the evidence submitted and the prevailing market rate in the area.

In the thirty-seven listed cases in which Mr. Austin was awarded a fee, he was awarded an hourly rate of \$200.00. The Board finds that the hourly rate of \$200.00 for Mr. Austin is reasonable, based on the evidence submitted and the prevailing market rate in the area.

Employer also contends that the Board should disallow 1.45 hours of the two hours billed by Mr. Wolfe for reviewing routine documents. We decline to do so. Claimant's counsel reasonably billed .25 of an hour for each entry, as a quarter-hour increment is the minimum billing increment set forth in the applicable regulation. 20 C.F.R. §802.203(d)(3); *see Gosnell*, 724 F.3d at 576, 25 BLR at 2-383-84; *Bentley*, 522 F.3d at 666, 24 BLR at 2-127.

⁴ Counsel inaccurately identifies the 2016 circuit court order as having been issued by the United States Court of Appeals for the Sixth Circuit. In fact, the United States Court of Appeals for the Fourth Circuit issued this Order. In that case, the Fourth Circuit noted that counsel's motion for attorney's fees was unopposed. *Donaldson Mine Co. v. Hinzman*, No. 16-1185 (4th Cir. Apr. 13, 2016) (Order).

⁵ Counsel also submitted a one page extract from The National Law Journal's 2014 Survey of Law Firm Economics, which purportedly shows that the average hourly billing rate for an attorney with thirty-one or more years of experience in the Atlantic Region is \$426.00. However, the extract does not indicate the distribution of participating law firms, and the Board is not persuaded that this chart sufficiently establishes the market rate for Mr. Wolfe.

Employer objects to the combined 10.00 hours billed by Mr. Wolfe and Mr. Austin for drafting claimant's Response Brief before the Board, as excessive. We are not persuaded by employer's arguments that a total of 10.00 hours to draft a response brief is excessive, duplicative, or unreasonable in this case, in light of the services provided. *See Lanning v. Director, OWCP*, 7 BLR 1-314 (1984); 33 U.S.C. §928; 20 C.F.R. §802.203. However, we agree with employer that the service rendered by Mr. Wolfe on April 4, 2017, submitting claimant's response brief to the Board, was clerical in nature. We therefore disallow the .25 hour requested for this service. *See Whitaker v. Director, OWCP*, 9 BLR 1-216, 1-218 (1986); *McKee v. Director, OWCP*, 6 BLR 1-233 (1983).

In all other respects, the Board finds the fees requested to be reasonable and commensurate with the necessary services performed in defending claimant's award of benefits. Therefore, we award claimant's counsel a total fee of \$3,500.00, representing 9.50 hours of legal services at an hourly rate of \$300.00 (Joseph E. Wolfe), and 3.25 hours at an hourly rate of \$200.00 (Brad A. Austin), to be paid directly to claimant's counsel by employer. 33 U.S.C. §928, as incorporated by 30 U.S.C. §932(a); 20 C.F.R. §802.203.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge